

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 10, 2013

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2012AP35
STATE OF WISCONSIN**

Cir. Ct. No. 2007FA1424

**IN COURT OF APPEALS
DISTRICT II**

IN RE THE MARRIAGE OF:

BERNADETTE MARIE GREENWOOD P/K/A BERNADETTE MARIE KAUFMAN,

PETITIONER-RESPONDENT,

V.

ROGER EUGENE KAUFMAN,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Waukesha County:
LLOYD CARTER, Judge. *Affirmed.*

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

¶1 PER CURIAM. Roger Kaufman appeals from a circuit court order deciding various postdivorce motions against him.¹ On appeal, he argues that the circuit court was biased against him, the court erroneously terminated the right of first refusal that accompanied the parties' placement provisions, and the court should have awarded him maintenance. We decide Kaufman's issues against him, and we affirm.

¶2 Kaufman and Bernadette Greenwood were divorced in December 2009. Maintenance was held open at the time of the divorce due to the parties' complex and difficult financial circumstances. Thereafter, Greenwood commenced a Chapter 13 bankruptcy case. In July 2010, Kaufman filed postdivorce motions relating to placement and financial matters, including maintenance. After several hearings, the circuit court extended the original maintenance hold-open period for thirty months after Greenwood completes her Chapter 13 bankruptcy plan. The court upheld the special master's termination of the right of first refusal, i.e., the right to have placement of the children when the other parent cannot care for them.

¶3 On appeal, Kaufman cites various remarks at the July 14, 2011 hearing to support his claim that Judge Kathryn Foster was objectively biased against him. Judge Foster presided over the parties' divorce and multiple hearings on the postdivorce motions. The challenged remarks were made at the conclusion of the last hearing.

¹ The Honorable Kathryn Foster presided over the proceedings that are the subject of this appeal. The Honorable Lloyd Carter entered the order memorializing those proceedings.

¶4 The first challenged remark was made as the circuit court concluded that the judgment of divorce and the marital settlement agreement did not provide for equal shared placement during the school year. The court remarked, “And you weren’t going to get a 50/50 order from me if we had a trial. That was pretty certain, because you couldn’t undo all the facts in the past.” Kaufman argues that because the custody and placement arrangements were stipulated at the time of the divorce, the court must have been biased against him because these issues were never contested.

¶5 Kaufman also finds bias in Judge Foster’s suspicion that he may have manipulated his employment status to remain unemployed until immediately after the divorce. The court remarked, “Lots of economic problems were caused in your significant period of unemployment, whether it was planned by you, acceded in by you, or really was just what the economy foisted on you.”

¶6 We “presume that the judge was fair, impartial, and capable of ignoring any biasing influences.” *State v. Gudgeon*, 2006 WI App 143, ¶20, 295 Wis. 2d 189, 720 N.W.2d 114. The objective bias test inquires “whether a reasonable person could question the judge’s impartiality.” *Id.*, ¶21.

¶7 We are not persuaded that the remarks cited by Kaufman suggest an impartial judge. Rather, we view the court’s remarks as akin to credibility determinations, which are within the circuit court’s purview. *Micro-Managers, Inc. v. Gregory*, 147 Wis. 2d 500, 512, 434 N.W.2d 97 (Ct. App. 1988). The remarks were made at the close of several hearing dates. In rendering her decision on the postdivorce motions, Judge Foster spoke at length about the parties’ conduct toward each other. The judge had ample time during the parties’ divorce and multiple postdivorce hearings to observe the parties, draw inferences and find

facts about their attitudes and conduct. On this record, the judge's familiarity with the parties did not breed objective bias.

¶8 Kaufman also complains that the postdivorce hearings occurred over several days and caused him and his counsel great expense. Litigants do not control the circuit court's calendar. *Sherman v. Heiser*, 85 Wis. 2d 246, 254, 270 N.W.2d 397 (1978). Circuit courts have authority to control their dockets. *Lentz v. Young*, 195 Wis. 2d 457, 465, 536 N.W.2d 451 (Ct. App. 1995).

¶9 Kaufman next argues that the judgment of divorce and the marital settlement agreement provided for equal shared placement of the children. Therefore, the circuit court erroneously construed the documents as providing otherwise. This issue is moot because a subsequent order entered on May 17, 2012 granted equal shared placement. We take judicial notice of this order, and we spend no more time on this issue. *Cf. Sweet v. Berge*, 113 Wis. 2d 61, 67, 334 N.W.2d 559 (Ct. App. 1983) (we need not decide unnecessary issues).

¶10 Kaufman argues that the circuit court erroneously terminated his right of first refusal. In practical application, the right of first refusal allowed Kaufman to have placement of the children when Greenwood was unable to care for them due to travel or other reasons. In discharging her duties as special master, Robin Kostroski terminated the right of first refusal, a decision the court characterized as "a rather drastic measure." The court noted that the special master's decision arose from Kaufman's conduct. The court found that the right is unworkable when the parents cannot communicate or agree or conduct themselves properly. The court cited the involvement of the police in the parties' interactions. The court found that Kaufman did not exercise good judgment when he sees an opportunity to "get [his] ex-wife."

¶11 In upholding the termination of the right of first refusal, the circuit court had the following record before it. The special master, Robin Kostroski, testified that the parties were unable to implement the right of first refusal because exercising the right requires cooperation and communication, which the parties could not manage. The master testified to e-mail indicating that Greenwood attempted to make placement arrangements under the right of first refusal, and Kaufman did not timely respond on several occasions, leaving great uncertainty for Greenwood and the children on the cusp of Greenwood's travel. Kaufman interfered with Greenwood's ability to travel for her employment. For high-conflict parents, the right of first refusal is disruptive to the children. The right of first refusal was not being used in this case for its intended purpose; rather, Kaufman used it as a way to stay in conflict with Greenwood. The master deemed the right of first refusal counter-productive in this case. The circuit court was entitled to rely upon the master's testimony and find it credible. The court made findings to support its determination that the right of first refusal was unworkable for the parties.²

¶12 Kaufman contends that the circuit court should have relied upon the remedy set out in the marital settlement agreement for problems with the right of first refusal: if the parent exercising the right of first refusal does not timely pick up and return the children, that parent forfeits the right of first refusal the next time the other parent travels.

² Because the parties have equal shared placement under a more recent circuit court order, we do not address whether the right of first refusal was intended to supplement Kaufman's placement under the judgment of divorce or whether the elimination of the right constituted a change in placement in the first two years postdivorce in violation of WIS. STAT. § 767.451(1)(a) (2011-12).

¶13 We do not agree that the circuit court was bound to the remedy in the marital settlement agreement. The remedy in the marital settlement agreement presupposes that the parties can function within the right of first refusal framework. The circuit court found that they could not. We see no error.

¶14 Kaufman next complains that the circuit court erroneously found that the marital settlement agreement and judgment of divorce did not allow for a maintenance award to reimburse him for expenses he incurred to maintain the marital residence. The November 2009 marital settlement agreement set out the parties' agreement that neither one could afford to keep and refinance the marital residence and the property should be sold. The marital settlement agreement stated that Kaufman had the sole right to occupy the residence as of November 17, 2009, and he was "solely responsible for the payment of utilities and the upkeep of the residence until the house closes...." The marital settlement agreement also stated that the "responsibility for 2007 and 2008 income taxes and responsibility for the first and second mortgages are held open to be determined by mutual agreement of the parties or further order of the Court."

¶15 In deciding this issue, the circuit court considered the parties' agreement at the time of the divorce that neither could afford to maintain the marital residence, and the financial decisions made at the time of the divorce were based on this assessment. The court noted during the hearing that "the parties didn't anticipate any obligation to each other because the home was going to be sold or go in foreclosure ... and instead [Kaufman] changed his mind." During questioning by the court at the July 14, 2011 hearing, Kaufman agreed that at the time of the divorce, the parties intended to dispose of the residence. Postdivorce, Kaufman decided to keep the residence, rendering him liable, in the circuit court's view, for the residence-related expenses. The court declined to require

Greenwood to reimburse Kaufman for residence-related expenses on property that was supposed to be sold. The court noted that Greenwood's Chapter 13 bankruptcy would have an impact on which debts would remain outstanding at the conclusion of her Chapter 13 plan. Therefore, the circuit court held open maintenance. We see no error.

By the Court.—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5 (2011-12).

